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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 710

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR

TRANSCRIPT OF RECORD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1944
CERTIORARI GRANTED JANUARY 8, 1945

SUPREME COURT OF THE UNITED STATES

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1 In the Tax Court of the United States

Docket No. 107302

TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF EDWARD T. BEDFORD,

v.

COMMISSIONER OF INTERNAL REVENUE

Amended Title Estate of Edward T. Bedford, Title Guarantee and Trust Co., Executor. See Order of 6-3-41.

Docket entries

Appearances: For Taxp'r: HOLT S. MCKINNEY, Esq. Fof Comm'r: H. C. CLARK, Esq.

1941

May 14—Petition received and filed. Taxpayer notified. Fee paid.
May 14—Copy of petition served on General Counsel.
May 31—Motion to amend the caption filed by taxpayer.
June 3—Order amending caption to read Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor entered.
June 17—Answer filed by General Counsel.
June 17—Request for hearing in New York City, filed by General Counsel.
2 June 19—Notice issued placing proceeding on New York, N. Y. Calendar. Service of answer and request made.

1942

Apr. 15—Hearing set May 25, 1942 in New York City.
May 28—Hearing had before Mr. Arundell, on the merits. Submitted. Stipulation of facts filed. Petitioner's brief due July 15, 1942. Respondent's due August 15, 1942. Reply, August 27, 1942.
June 9—Transcript of hearing 5-28-42 filed.
July 15—Brief filed by taxpayer. 7-15-42. Copy served.
Aug. 17—Motion for extension to August 31, 1942 to file brief filed by General Counsel. 8-18-42. Granted.
Aug. 18—Brief filed by General Counsel. Served 8-19-42.
Aug. 26—Motion for extension to September 2, 1942 to file reply brief filed by taxpayer. 8-27-42. Granted.
Aug. 31—Reply brief filed by taxpayer. 8-31-42. Copy served on General Counsel.

1943

Jan. 26—Opinion rendered, Arundell, Judge, Div. 7. Decision will be entered for respondent. 1-27-43. Copy served.

Jan. 27—Decision entered, Murdock, Judge, Div. 3.

Apr. 26—Supersedeas Bond in the amount of $27,774.48 approved and ordered filed.

Apr. 26—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by taxpayer.

May 26—Proof of service filed by taxpayer.

June 17—Motion for extension to 8-10-43 to transmit record filed by taxpayer.

June 17—Order enlarging time to August 10, 1943 to prepare and deliver the record entered.

July 21—Joint praecipe for record filed.

3 In the Tax Court of the United States

Petition

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, issued by the Internal Revenue Agent in Charge for the Second New York Division, dated February 14th, 1941, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under the laws of the State of New York with its principal office at No. 176 Broadway, Borough of Manhattan, City and State of New York, and is the Executor of the Last Will and Testament of Edward T. Bedford. Return for the period here involved was filed with the Collector of Internal Revenue for the Second District of New York.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 14th, 1941.

3. The taxes in controversy are income taxes for the calendar year 1937 in the sum of $13,887.24.

ASSIGNMENTS OF ERROR

4. The determination of the tax set forth in said Notice of Deficiency is based on the following errors:

(a) The Commissioner erred in determining that petitioner received a taxable dividend of $45,240 from the Abercrombie and

Fitch Company upon the recapitalization of said company in 1937.

(b) The Commissioner erred in failing to determine that Abercrombie and Fitch Company was reorganized in accordance with the provisions of Section 112 (b) (3), 112 (c) (1) and 112 (g) (1) of the Revenue Act of 1936, and that the cash of $45,240 received by petitioner in 1937 from said reorganization constituted taxable income only to the extent provided for in Section 112 (c) (1) of the Revenue Act of 1936.

(c) The Commissioner erred in failing to determine that petitioner's taxable profit in 1937 from the reorganization of the Abercrombie and Fitch Company was $18,096.

STATEMENT OF FACTS

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In 1937 petitioner owned 3,000 shares of 7% Preferred stock (par value $100 per share of the Abercrombie and Fitch Company (hereinafter called the "old stock"), which had been acquired by the said Edward T. Bedford prior to his death and were owned by him at the time of his death. Edward T. Bedford died on May 21, 1931 and the value of said shares on May 21, 1931, as appraised for Federal Estate Tax purposes, was $210,000.

(b) Pursuant to a "Plan of Recapitalization of the Abercrombie and Fitch Company" adopted at a meeting held by the Board of Directors on November 5th, 1936, and approved at a special meeting of the stockholders of the Abercrombie and Fitch Company held on December 8th, 1936, the petitioner received in January, 1937, in exchange for the 3,000 shares of "old stock" ($100 par value per share), the following: 3,000 shares new Preferred stock ($75 par value per share), 1,500 shares Common stock ($1 par value per share) and cash in the amount of $45,240.00. On January 15, 1937, the date of exchange of stock under the above plan, the fair market value of the new securities and cash received under said plan was as follows:

3,000 shares of new Preferred stock	$225,000
1,500 shares Common	15,750
Cash	45,240
Total	285,990

(c) The Commissioner, in his determination of petitioner's taxable profit in 1937 resulting from the said reorganization of Abercrombie and Fitch Company, treated the above-mentioned cash payment of $45,240 as a taxable dividend.

(d) Petitioner in its income tax return for 1937 determined its taxable profit from said reorganization of Abercrombie and Fitch Company in accordance with the provisions of Section 112 (c) (1) and Section 117 (a) of the Revenue Act of 1936. Gain was recognized to the extent of the cash received, namely $45,240 of which 40% constituted taxable income in 1937.

(e) At the time of the adoption of the "Plan of Recapitalization of the Abercrombie and Fitch Company" by its stockholders on December 8, 1936 and at all times thereafter until the exchange of petitioner's shares on January 15, 1937, pursuant to said plan, the Abercrombie and Fitch Company had no accumulated earnings or profits available for distribution as a dividend.

Wherefore, petitioner prays that the Board may hear this proceeding, determine that there is no deficiency in petitioner's
6 income tax liability for the year 1937, and grant such other and further relief to the petitioner as may seem just and proper.

HOLT S. MCKINNEY,
Holt S. McKinney,
Counsel for Petitioner.
Office and Postoffice Address, 122 East 42nd Street,
Borough of Manhattan, City of New York.

(Verified May 12, 1941.)

Exhibit A, annexed to petition

SA-IT-1

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Form 1230 (Emblem) Office of Internal Revenue Agent in Charge, Second New York Division.

Feb. 14, 1941.

ESTATE OF EDWARD T. BEDFORD,
Title Guarantee and Trust Company, Executor,
176 Broadway, New York, New York.

SIRS: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1937,
7 discloses a deficiency of $13,887.24 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing

of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Revenue Agent in Charge, 90 Church St., New York, N. Y., for the attention of LAL–90D. The signing and filing of this form will expedite the close of your return(s) by permitting and early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By C. R. KRIGBAUM,
Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

8

STATEMENT

TAX LIABILITY FOR TAXABLE YEAR ENDED DECEMBER 31, 1937

Income tax, liability $29,153.40; assessed $15,266.16; deficiency $13,887.24.

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 29, 1938; to your protest dated September 6, 1940; and to the statements made at the conferences held on August 26 and October 18, 1940, and January 22, 1941.

A copy of this letter and statement has been mailed to your representative, Mr. Henry F. Matheis, 176 Broadway, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$65,701.76
Unallowable deduction and additional income: (a) Dividends	45,240.00	
Total		110,941.76
Nontaxable income and additional deduction: 25% capital gain		18,098.00
Net income adjusted		92,843.76

9

EXPLANATION OF ADJUSTMENTS

(a) The amount of $45,240.00, representing cash received upon recapitalization of Abercrombie and Fitch Company (New York):

is held to be taxable as a dividend under the provisions of the Revenue Act of 1936.

(b) Amount of $18,096.00 taken into account in determining capital gains reported on the return has been eliminated as a result of adjustment (a), supra.

COMPUTATION OF TAX, REVENUE ACT OF 1936

Net income adjusted	$92,845.76
Less: Personal exemption	1,000.00
Balance (surtax net income)	91,845.76
Net income subject to normal tax	91,845.76
Normal tax at 4% on $91,845.76	3,673.83
Surtax on $91,845.76	25,515.17
Total tax	29,189.00
Less: Income tax paid at the source	35.60
Correct income tax liability	29,153.40
Income tax assessed: Original Account No. 187006	15,265.16
Deficiency of income tax	13,887.24

10 In the Tax Court of the United States

Answer.

The respondent by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceedings, admits, denies and avers as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits the allegations in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1937, but denies all other allegations in paragraph 3 of the petition.

4. Denies the allegations in subparagraphs (a), (b), and (c) of paragraph 4 of the petition.

5. (a) Admits the allegations in subparagraph (a) of paragraph 5 of the petition.

(b) Admits all the allegations in subparagraph (b) of paragraph 5 of the petition, except that respondent denies that the fair market value of the new securities is as alleged in said subparagraph.

(c) Admits the allegations in subparagraph (c) of paragraph 5 of petition.

(d) (e) Denies the allegations in subparagraphs (d) and (e) of paragraph 5 of the petition.

11 Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petition herein be denied.

J. P. WENCHEL,
H. D. T.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
E. C. ALGIRE,
Division Counsel,
HENRY C. CLARK,
Special Attorney,
Bureau of Internal Revenue.
HCC:GEB 6/11/41.

12 In the Tax Court of the United States

Docket No. 107302

TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF EDWARD T. BEDFORD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Motion to amend the caption of the proceeding

Comes now the petitioner by its counsel, Holt S. McKinney, and moves for an order by the Board amending the caption of the above proceeding so as to make it read as follows:

Docket No. 107302

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

And for cause of this motion petitioner says that said amendment is requested in order to make the caption in the above
13 proceeding conform with the provisions of Rule 4 of the Rules of Practice before the United States Board of Tax Appeals, as revised April 1, 1941.

Wherefore, it is prayed that this motion be granted.

HOLT S. MCKINNEY,
Counsel for Petitioner.

In the Tax Court of the United States

Order amending caption of the proceeding

On motion of counsel for the petitioner, it is

Ordered, that the caption of the proceeding at the above docket number be and it is hereby amended to read Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor, Petitioner, v. Commissioner of Internal Revenue, Respondent.

[SEAL] (S) C. R. ARUNDELL,
Member.

Dated: Washington, D. C., June 3, 1941.
FBH.
cgh.

14 In the Tax Court of the United States

Stipulation of facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, for the purpose of a trial of this action and all other proceedings herein, that the facts hereinafter stated shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other evidence not inconsistent with the facts herein stipulated.

1. The petitioner is a corporation organized and existing under the laws of the State of New York with its principal office at No. 176 Broadway, Borough of Manhattan, City and State of New York, and is the Executor of the Last Will and Testament of Edward T. Bedford. Petitioner's income tax return for the taxable year ended December 31, 1937, was duly filed with the Collector of Internal Revenue for the Second District of New York. The return disclosed a total income tax in the amount of $15,266.16, which was duly paid.

2. In 1937 petitioner owned 3,000 shares of 7% Cumulative Preferred Stock (par value $100 per share) of the Abercrombie and Fitch Company, which shares of stock had been acquired by the said Edward T. Bedford prior to his death and were owned by him at the time of his death. Edward T. Bedford died on May 21, 1931, and the fair market value on May 21, 1931, of said 3,000 shares of 7% Cumulative Preferred Stock of Abercrombie and Fitch Company was two hundred and ten thousand dollars ($210,000).

3. In accordance with a "Plan of Recapitalization of the Abercrombie and Fitch Company" adopted at a meeting held by the Board of Directors on November 5, 1936, and approved at a special meeting of the stockholders of the Abercrombie and Fitch Company held on December 8, 1936, the petitioner received in January, 1937, in exchange for the said 3,000 shares of 7% Cumulative Preferred Stock ($100. par value per share) of the Abercrombie and Fitch Company, the following: 3,500 shares of the Cumulative Preferred Stock of the Abercrombie and Fitch Company of a par value of $75. per share and an annual dividend of $6. per share; 1,500 shares of the Common Stock of the Abercrombie and Fitch Company of a par value of $1. per share; and cash in the amount of $45,240. A copy of the said "Plan of Recapitalization of the Abercrombie and Fitch Company" is hereto attached and marked Exhibit A, together with a copy of the notice of the approval of said plan by the stockholders on December 8, 1936—marked Exhibit B.

4. On January 15, 1937, the date petitioner exchanged its 3,000 shares of 7% Cumulative Preferred Stock of Abercrombie and Fitch Company in accordance with said "Plan of Recapitalization of the Abercrombie and Fitch Company", the fair market value of the new securities and cash received by petitioner under the said plan was as follows:

	Fair market value
3,500 shares new Cumulative Preferred Stock of the Abercrombie and Fitch Company of a par value of $75. per share and an annual dividend of $6. per share	$288,750
1,500 shares of the Common Stock of the Abercrombie and Fitch Company of a par value of $1. per share	15,750
Cash of $45.08 per share	45,240
Total Fair Market Value	349,740

5. On January 31, 1936 the Surplus Account, per books, of the Abercrombie and Fitch Company showed a deficit of $399,771.87, after deduction of three stock dividends, which respondent contends are not proper charges to surplus. A summary analysis of this Surplus Account from January 1, 1913 to January 31, 1936, is hereto attached and marked Exhibit C.

6. For the taxable year ended January 31, 1937 the Abercrombie and Fitch Company had net earnings after taxes of $309,073.70.

Dated: New York, N. Y., May the 27th 1942.

HOLT S. MCKINNEY,
Attorney for Petitioner.

(Signed) J. P. WENCHEL'S
RPH
Attorney for Respondent.

17 *Exhibit A, annexed to stipulation of facts*

ABERCROMBIE & FITCH COMPANY

MADISON AVENUE AT 45TH STREET, NEW YORK

Notice of Special Meeting of Stockholders to be held 11 o'clock a. m., December 8, 1936.

Letters of President, Plan of Recapitalization, and Proposed Amendment of Certificate of Incorporation

19 ABERCROMBIE & FITCH COMPANY.

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS

Notice is hereby given that a Special Meeting of the Stockholders of Abercrombie & Fitch Company will be held at its principal and registered office, Madison Avenue at 45th Street, New York, on the 8th day of December, 1936, at 11:00 o'clock in the forenoon for the following purposes:

1. To consider and act upon a plan for the recapitalization of the Corporation (including an increase of the number of its shares to 121,000 shares, the present authorized 20,000 shares of Preferred or Preference Stock, with a cumulative annual dividend rate of 7%, being changed into 21,000 shares of new Sinking Fund Preferred Stock with a par value of $75 per share, and an annual dividend rate of $6.00 per share per annum, the dividends on the Preferred Stock to be cumulative from and after January 1, 1937, and the Preferred Stock being subject to call and redemption, and the previously authorized shares of Common Stock without par value being changed into the same number of shares with par value of $1.00 per share and the changing of the designations, preferences and privileges and voting powers or restrictions or qualifications of the shares of each class of stock, and a reduction of the amount of the capital of the Corporation), as declared advisable and set forth in a resolution adopted by the Board of Directors of the Corporation at a meeting held November 9th, 1936, copy of which, marked "Exhibit A," is annexed hereto and made a part hereof.

2. To consider and act upon a proposed amendment of the
20 Certificate of Incorporation, as heretofore amended, which amendment has been proposed and declared advisable by the Board of Directors in and by said resolution and as fully set forth in said copy thereof, marked "Exhibit A", annexed hereto and made a part hereof.

3. To transact such other business in conenction with the foregoing matters or otherwise, as may properly come before the meeting or any adjournment or adjournments thereof.

The Transfer Books will not be closed but only stockholders of record at the close of business on November 18, 1936, will be entitled to notice of and to vote at said meeting or any adjournment or adjournments thereof.

Stockholders who will be unable to attend the meeting in person are requested to date, sign and promptly mail the enclosed proxy, in the envelope herewith.

By order of the Board of Directors.

F. L. McAFEE,
Secretary.

Dated, November 12th, 1936.

The Signature on the proxy should correspond with name of the Stockholder as it appears on the envelope by which this notice is received.

A proxy to be executed by a corporation should be signed in its name by its President or other officer duly authorized to sign the same, and its corporate seal should be affixed and attested by its Secretary or other proper officer.

Executors, Administrators and Trustees should execute the proxy in the same manner as is done by them in executing formal legal documents.

21

MADISON AVENUE AT 45TH STREET.
New York, N. Y., November 12th, 1936.

To the Stockholders of ABERCROMBIE & FITCH COMPANY:

There is submitted herewith for your consideration a proposed Plan of Recapitalization of the Company.

Perhaps, I should explain immediately why recapitalization in this particular instance is necessary and what it means to stockholders.

In the early years of the depression we incurred losses as a result of which we accumulated a deficit.

Under the New York State Laws we are not permitted to pay dividends except out of surplus or earnings, and regardless of what our current earnings may be we cannot pay a dividend to shareholders while we have a deficit. Our earnings today are such that we may appropriately pay a dividend to Preferred and Preference shareholders if the required number of shareholders agree to a plan which makes such a payment legal.

If you will study this plan as presented herewith, you will see that the intent of this proposal has been to create a situation so

that Preferred and Preference shareholders may immediately share in the earnings of the Company.

The present total authorized capital stock is 120,000 shares, of which 20,000 shares are 7% Cumulative Preferred or Preference Stock with a par value of $100 per share, and 100,000 shares are no par value Common Stock with a stated value of $5.00 per share. Of the foregoing 17,973 shares of the 7% Cumulative Preferred or Preference Shares and 71,800 shares of the Common Stock are issued and outstanding.

22 No dividends have been paid on either of the Preferred and Preference or Common Stocks since October 1, 1931 and the accumulations upon the former stock at the rate of 7% per annum amounted on July 1, 1936, to $33.25 per share.

Accompanying the plan you will find a copy of the report of Messrs. Haskins & Sells, Certified Public Accountants, containing a consolidated Balance Sheet showing the financial position of the Company as of July 31, 1936. The report also contains a pro forma consolidated Balance Sheet as of the same date, after giving effect to the proposed recapitalization as set forth in the resolution adopted by the Board of Directors recommending the plan.

The Board of Directors has felt that a plan which would dispose of the accumulated arrears of dividends on the present outstanding 7% Cumulative Preferred or Preference Shares and prepare the way for resumption of dividend payments on a current basis would be most desirable and would be favorably considered by all the Stockholders.

To this end the Board of Directors directed its Executive Committee to consider the matter, and formulate a plan, which the Committee has done and which the Board of Directors after careful consideration has approved. The plan submitted herewith and marked "Exhibit A," provides substantially as follows:

(1) For the increase of the total authorized shares from 120,000 to 121,000 of which 21,000 are to be Cumulative Sinking-Fund Preferred Stock of a par value of $75 per share, with an annual dividend rate of $6. per share and of a voluntary liquidating or call value of $106.50 per share, and an involuntary liquidating value of $100. per share; and 100,000 shares are to be Common Stock of a par value of $1. per share.

(2) The holders of the 7% Cumulative Preferred or Preference Stock shall receive in exchange for each share of such
23 stock and in full satisfaction, liquidation, and discharge of all accumulated dividends to and including December 31, 1936, and any and all other rights, preferences, or claims thereon, one and one-sixth shares of the fully paid and non-assessable,

Cumulative Sinking Fund Preferred Stock with an annual dividend rate of $6. per share, and one-half share of the fully paid and non-assessable Common Stock with a par value of $1. per share, and $15.08 in cash.

The holders of the no par value Common Stock are to receive in exchange for each share thereof, one share of the new Common Stock having a par value of One ($1.00) Dollar.

(3) That the voting power shall be in the Common Stock, except upon three (3) consecutive defaults in paying the half yearly dividend on the Cumulative Preferred Stock, whereupon the Preferred Shares shall have the exclusive right to the election of Directors until all back dividends and current dividends thereon shall have been paid in full, and except as otherwise provided for in the Certificate of Incorporation. So long as 25% of the total authorized new Preferred Stock is issued and outstanding the holders of all of the new Preferred Stock shall have the right to elect approximately one-third of the members of the Board of Directors.

(4) That the holders of the 7% Cumulative Preferred or Preference Shares and of the no par value Common Shares shall have until December 31, 1936, to deposit their shares and receive the new shares in exchange. Dividends on the new Preferred Stock shall begin to accrue as of January 1, 1937, and no dividend thereafter will be accrued or paid upon the old Preferred or Preference Stock.

24 (5) The Company may deposit in escrow with the Chase National Bank of the City of New York or such other bank in the City of New York as the Board of Directors may select, the new shares to which any nonexchanging shareholder would have been entitled to receive if such shareholder had made such exchange within the time limit, and the dividends on the new shares so deposited in escrow may likewise be deposited with such escrow bank.

If the proposed plan and amendment of the Certificate of Incorporation of the Company become effective, notice of the time and place for presenting the old shares for exchange will be hereafter given.

There is to be no arrangement for underwriting as the proposed plan is merely a readjustment of the interests of the Stockholders in the Corporation, and no commission or other remuneration is to be paid or given, directly or indirectly, for or upon the exchange of your stock.

It is believed that the exchange of the old 7% Cumulative Preferred or Preference Stock for the new $6 Cumulative Preferred Stock, will not result in any taxable gain or deductible loss for

the purpose of Federal or New York State Income Taxes, but that the cash payment of $15.08 per share will be taxable.

A two-thirds vote of each class of stock outstanding as of the close of business on November 18, 1936, will be necessary to make the plan effective.

Your Corporation has been most fortunate in being able to emerge, to the extent it has, from the depression years of low prices and most unsatisfactory business conditions and this, and the knowledge that the Directors, Officers and entire personnel have given untiring efforts to make this possible should be gratifying to the Stockholders.

You are requested to sign and promptly return the enclosed proxy. Executors, Administrators and Trustees are requested to submit therewith a certificate of recent date, showing their appointment as such.

On behalf of the Board of Directors,

By JAMES S. COBB,
President.

Exhibit A

PLAN OF RECAPITALIZATION OF THE ABERCROMBIE & FITCH COMPANY

Resolution by the Board of Directors adopted at a meeting held on November 5th, 1936.

Resolved, that the Board of Directors of the Abercrombie & Fitch Company hereby declares that it is advisable:

(1) That the total authorized capital stock of the Company consisting of 120,000 shares, of which, 20,000 shares are 7% Cumulative Preferred or Preference Stock of a par value of $100.00 each and 100,000 shares are Common Stock of no par value, but with a stated value of $5.00 each, be changed into 121,000 shares, of which 21,000 shares are to be Cumulative Preferred Stock of a par value of $75.00 each, and of which 100,000 shares are to be Common Stock with a par value of one ($1.00) dollar each.

(2) That the said Cumulative Preferred Stock shall (a) be entitled to annual dividends at the rate of $6.00 per share Cumulative from and after January 1st, 1937, before any dividends shall be paid or set apart on the Common Stock and, after paying or setting apart dividends at the rate of $6.00 per share per annum on the Cumulative Preferred Stock the Common Stock only shall participate in the net earnings of the Company applicable to dividends; (b) be subject to call and redemption; (c) be paid in case of voluntary liquidation or dissolution

or distribution of assets of the Company the sum of $106.50 per share, plus dividends accumulated and unpaid thereon after January 1st, 1937, except as otherwise stated aforesaid; (d) be paid in case of involuntary liquidation or dissolution or distribution of assets of the Company the sum of $100.00 per share, plus dividends accumulated and unpaid thereon after January 1st, 1937, except as otherwise stated aforesaid.

That in case of liquidation or dissolution or distribution of assets of the Company, whether the same be voluntary or involuntary, and after payment of all unpaid cumulative dividends, and the sum per share to which the Preferred is entitled, the remaining assets of the Company shall be payable to the Common Shares; that the Common Stock shall have the sole voting power except as otherwise provided in the hereinafter proposed amendment of the Certificate of Incorporation.

(3) That when the amendment, as hereinafter provided, of the Certificate of Incorporation of the Company becomes effective, the holders of the outstanding shares of the 7% Cumulative Preferred or Preference Stock shall cease to become holders of such shares respectively and shall be and become respectively holders of and entitled to receive one and one-sixth shares of the Cumulative Preferred Stock of a par value of $75.00 and an annual dividend of $6.00 per share, and one-half share of the Common Stock of a par value of $1.00 per share, and $15.08 in cash, for each one share of 7% Cumulative Preferred or Preference Stock held by them respectively as of the close of business, December 31, 1936; that thereafter the holders of the present outstanding 7% Cumulative Preferred or Preference Stock shall cease to be entitled to any rights, privileges or claims (in-
27 cluding, but not by way of limitation of the generality of the foregoing, any rights or claims of whatever kind or character, to any and all unpaid accumulated dividends accrued or in arrears upon the shares of 7% Cumulative Preferred or Preference Stock) which they heretofore had or may now or hereafter have by reason of the holding or owning of shares of such 7% Cumulative Preferred or Preference Stock, except the right to receive the said Cumulative Preferred Stock with a par value of $75.00 per share and the One ($1.00) dollar par value Common Stock and cash above mentioned in exchange therefor; and that each and all such rights, preferences, privileges and claims shall in all respects be forever released, discharged and extinguished and of no force or effect whatsoever; that in respect to all shares of the 7% Cumulative Preferred or Preference Stock not deposited for exchange on or before the date above provided, the Company through its proper officers or officer may deposit

in a special account with a solvent bank or trust company doing business in the Borough of Manhattan, City and State of New York, the shares of the Cumulative Preferred Stock with a par value of $75.00 and the Common Stock and the cash to which the holder of such 7% Cumulative Preferred or Preference Stock would be entitled to have received if such holder had so deposited his or her or its 7% Cumulative Preferred or Preference Stock as required in notice to be given to such Preferred or Preference Stock holders; and that the holders of the no par value Common Stock shall cease to become holders of such shares respectively and shall be and become respectively holders of and entitled to receive one share of the $1.00 par value Common Stock for each one share of no par value Common Stock held by them respectively as of the close of business on the 31st day of December, 1936.

(4) That upon the consummation of the recapitalization herein provided for, appropriate changes and adjustments be made on the books, records and statements of the Company and its subsidiaries, to give effect to the changes in the capital of the Corporation as herein provided.

(5) The Certificate of Incorporation of the Company as heretofore amended, be amended, changed and altered to read as follows:

Certificate of increase of the number of shares and reduction of par value of preferred or preference shares and change of shares without par value into shares with par value and classification and reclassification of shares and change regarding the designations, preferences, privileges and voting powers or restrictions or qualifications of the shares of each class of stock and reduction of the amount of the capital of Abercrombie & Fitch Company, pursuant to Section 36 of the Stock Corporation Law.

We, the undersigned, James S. Cobb and F. L. McAfee, being respectively the President and Secretary of Abercrombie & Fitch Company, hereby certify:

First. The name of the corporation is Abercrombie & Fitch Company.

Second. The date of the filing of the Certificate of Incorporation in the office of the Secretary of State of New York, is November 1st, 1904.

Third. The amount of the capital of the corporation is Two Million One Hundred Fifty-six thousand three hundred ($2,156,300) dollars.

Fourth. The total number of shares which the corporation is already authorized to issue is One Hundred Twenty thousand (120,000) shares of which Twenty thousand (20,000) shares having a par value of One hundred ($100.) dollars each are Preferred

or Preference and One hundred thousand (100,000) shares without par value are Common.

The designations, preferences, privileges and voting powers, or restrictions or qualifications of said Preferred or Preference Stock and said Common Stock are as follows:

(a) The Preference Stock is senior to the Common Stock, and the Common Stock is subject to all the rights and preferences of the Preference Stock as herein set forth.

(b) The holders of the Preference Stock shall be entitled to receive, and the Corporation shall be bound to pay thereon, dividends at the rate of seven per centum (7%) per annum and no more, payable in cash quarterly on the first days of January, April, July and October in each year, as and when declared by the Board of Directors, out of the surplus of the Corporation. Such dividends shall be cumulative but arrears thereof shall be paid without interest. Such dividends shall accrue, in the case of shares issued prior to April 1, 1928, from January 1, 1928, and in the case of shares issued on or after April 1, 1928, from the first day of the dividend period in which such shares are issued. Such dividends shall be deemed to accrue from day to day, regardless of whether or not earned or declared.

(c) In no event, so long as any Preference Stock is outstanding, shall any dividend whatsoever be declared or paid on any junior class of stock, or shall any distribution of capital, surplus or profits be made on any junior class of stock, or shall any shares of any junior class of stock be purchased or redeemed by the Corporation, or shall any moneys be paid to or made available for any sinking fund for the purchase or redemption of any junior class of stock:

(1) Unless the full quarterly dividends on the Preference Stock for all past quarterly dividend periods shall have been paid and the quarterly dividend on the Preference Stock for the current quarterly dividend period shall have been paid or declared and set apart in full;

(2) Unless the Corporation has made the payment, if any, then due under the requirements of the Preference Stock sinking fund for the then current year, and all defaults, if any, in complying with said sinking fund requirements in respect of previous years have been made good; and

(3) Unless the surplus of the Corporation (and its subsidiaries, if any, on a consolidated basis), excluding from the computation thereof for this particular purpose all items of goodwill and similar intangibles, after adequate reserves or deductions for all taxes, depreciation, uncollectible debts, contingent liabilities, and all proper accounting charges, and with

proper eliminations for any inter-company accounts, shall be in excess of the amount of $400,000 and the payment of such dividends on any junior class of stock of the Corporation, or the taking of such other action, shall not reduce such surplus below said amount; provided that in determining the amount of such surplus there shall not be included;

(I) Surplus arising from an increase in the value of any assets, unless actually realized upon sale or other disposition thereof; or

(II) Surplus used for the purchase or the acquisition by the Corporation of shares of any class of its stock other than the Preference Stock, or created or growing out of the acquisition or retirement by the Corporation of shares of any other class of its stock; or

(III) Surplus arising from any change in par value, stated capital, or capital attributable to its shares of stock of any class.

(d) Subject to all the rights of the Preference Stock, dividends may be paid on the Common Stock, as and when declared by the Board of Directors, out of the surplus of the Corporation.

(e) Upon any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the Preference Stock shall be entitled, before any distribution is made to any class of stock junior to the Preference Stock, to be paid the sum of $110 per share, and an amount equal to all unpaid cumulative dividends, whether earned or declared or not, which have accrued thereon to the date of distribution upon liquidation; but the Preference Stock shall not be entitled to any further pay-
32 ment, and the remaining net assets of the Corporation shall be distributed pro rata to the Common Stock.

(f) Except as otherwise provided in this certificate of incorporation and the amendments thereto, or as otherwise required by law, the Preference Stock shall have no right to vote for the election of directors or for any other purpose (including a proceeding for mortgaging the property and franchises of the Corporation, for guaranteeing the bonds of another corporation, for the sale of the franchises and property, for establishing priorities or creating preferences among the several classes of stock, for consolidation, for voluntary dissolution, or for change of name), and shall not be entitled to receive notice of any meeting of stockholders, and all voting rights for the election of directors, and for authorizing any corporate action whatsoever required to be authorized by the stockholders, and for all other purposes, shall be vested exclusively in the Common Stock; provided, however, that if and whenever six quarterly dividends on the Preference Stock shall be unpaid in whole or in part, then the Preference Stock shall be entitled to the exclusive voting right for the election of directors, until all arrears

in dividends on the Preference Stock shall have been paid in full and the quarterly dividends thereon for the current quarterly dividend period shall have been declared and set apart in full (which shall be done as expeditiously as practicable), and thereupon the exclusive voting right for the election of directors shall be divested from the Preference Stock and revested in the Common Stock.

In any case, where the Preference Stock shall become vested with the exclusive voting right for the election of directors, a meeting of the Preference stockholders shall forthwith be called and at such meeting the Preference stockholders may, by a vote of a majority of all the shares of Preference Stock outstanding,
33 remove from office all directors then holding office and elect a new Board of Directors.

Similarly, in any case where the Common Stock shall become re-vested with the exclusive voting right for the election of directors, a meeting of the Common stockholders shall forthwith be called, and at such meeting the Common stockholders may, by a vote of a majority of all the shares of Common Stock outstanding, remove from office all directors then holding office and elect a new Board of Directors.

Each stockholder entitled to vote at any particular time in accordance with the foregoing provisions, shall have one vote for each share of the stock at the time entitled to voting rights held of record by him on the date fixed for determining voting rights.

(g) The affirmative vote of the holders of at least two-thirds ($^2/_3$) in interest of the Preference Stock at the time outstanding, given in person or by proxy, at a meeting called for the purpose, at which the Preference Stock shall vote separately as a class, shall be necessary for effecting or validating any one or more of the following:

(1) Any authorization, creation or issue of any new class of stock having any preference or priority which is or would be superior to or on an equality with any preference or priority of the Preference Stock provided for herein; or any authorization, creation or issue of any obligation or security convertible into or evidencing the right to purchase any stock having any such preference, priority or equality; provided that the provisions of this sub-paragraph (1) shall not apply to the authorization, creation or issue of additional shares of the Preference Stock; or

(2) Any issue of shares of Preference Stock in excess of a
34 total of 3,000 shares; provided that such affirmative vote shall not be necessary for effecting or validating any such issue if the net earnings of the Corporation (and its subsidiaries, if any, upon a consolidated basis), plus the net earnings of the properties, if any, to be acquired by all or any part of the proposed

issue of Preference Stock or the proceeds thereof shall for a period of twelve (12) successive calendar months ending within the ninety (90) days immediately preceding such issue, amount to not less than two and one-half times, or shall for a period of twenty-four successive calendar months ending within the ninety (90) days immediately preceding such issue, amount to five times the aggregate annual dividend requirements on the shares of Preference Stock outstanding and those then proposed to be issued; or

(3) Any amendment of this certificate of incorporation which would alter or change the preferences of the Preference Stock; or

(4) The creation of any mortgage, lien, charge or encumbrance of any kind upon any part of the real or personal property of the Corporation or of any subsidiary; or the creation of any bonds, notes, or other evidences of indebtedness maturing more than eighteen months from the date of issue; provided, however, that this restriction shall not apply to:

I. The giving of purchase money mortgages or other purchase money liens on property that may hereafter be acquired by the Corporation or any subsidiary; or the renewal or refunding of such mortgages; or

II. The acquisition of property subject to mortgages, liens, charges or encumbrances thereon then existing; or the renewal or refunding of such mortgages; or

III. The pledging by the Corporation or by any subsidiary, as security for loans made to it in the regular and current conduct of its business, or notes, accounts receivable, merchandise, stocks, bonds or other securities or other liquid assets owned by it, other than obligations, securities or stock of any subsidiary.

The term "Subsidiary" as used in this certificate of amendment shall include any corporation a majority of whose outstanding stock having voting power under ordinary circumstances is at the time owned or controlled, directly or indirectly, by the Corporation or by another subsidiary. The term "net earnings" shall mean the net income of the Corporation (and its subsidiaries, if any, upon a consolidated basis, with proper eliminations for inter-company accounts and with proper allowances for stock interest not owned by the Corporation in subsidiaries), after proper deductions for depreciation, all taxes and other items applicable to the period in accordance with good accounting practice, but without any deduction or allowance on account of dividend or sinking fund payments.

When under the provisions of sub-paragraph (2) of this paragraph (g), the net earnings of the Corporation (and its subsidiaries, if any, upon a consolidated basis) are required to be

computed for a stated period, and any properties have been acquired by the Corporation or its subsidiaries which were not owned by the Corporation or its subsidiaries during all or part of the period for which such computation is to be made, then and in every such case the net earnings of such properties during the entire period for which the computation is to be made shall be treated and considered as part of the net earnings of the Corporation for such period.

(h) The Corporation, at the option of the board of directors, may redeem the whole or from time to time redeem any part
36 of the Preference Stock on any dividend date, by paying therefor in cash $112.50 per share plus an amount equal to all unpaid cumulative dividends, whether earned or declared or not, accrued thereon to and including the date of redemption, such sum being hereinafter sometimes referred to as the redemption price. In case of the redemption of a part only of the outstanding Preference Stock, the Corporation shall designate by lot, in such manner as the board of directors may determine, the shares to be redeemed, or shall effect such redemption pro rata. At least thirty (30) days' previous notice by mail, postage prepaid, shall be given to the holders of record of the Preference Stock to be redeemed, such notice to be addressed to each such stockholder at his post office address as shown by the records of the Corporation. On or after the date of redemption stated in such notice, each holder of Preference Stock called for redemption shall surrender his certificate for such stock to the Corporation at the place designated in such notice and shall thereupon be entitled to receive payment of the redemption price. In case less than all the shares represented by any such surrender certificate are redeemed a new certificate shall be issued representing the unredeemed shares. If such notice of redemption shall have been duly given, and if on or before the redemption date funds necessary for the redemption shall have been set aside so as to be and continue available therefor, then, notwithstanding that the certificates representing any shares of Preference Stock so called for redemption shall not have been surrendered, the dividends thereon shall cease to accrue after the date of redemption and all rights with respect to the shares so called for redemption shall forthwith after such redemption date cease and determine, except only the right of the holders to receive the redemption price without interest. At any time after giving notice of redemption, as aforesaid, of all or any part of the Preference Stock, the
37 Corporation may deposit with a bank or trust company in the Borough of Manhattan, City and State of New York, as a trust fund for the benefit of the holders of the shares called for redemption, an amount in cash sufficient to pay the re-

demption price of such shares. After the making of such deposit, such shares shall not be deemed to be outstanding for any purpose, and the rights of the holders thereof shall be limited to the right to receive payment of the redemption price from such fund upon surrender of the certificates on or after the redemption date. Subject to the provisions hereof, the board of directors shall have authority to prescribe from time to time the manner in which Preference Stock shall be redeemed.

(i) The Preference Stock shall be entitled to the benefit of a sinking fund as set forth in this paragraph (i). On May 15th in the year 1929 and in each year thereafter so long as any Preference Stock remains outstanding, the Corporation shall make available out of its surplus which would at the time be legally available for the declaration of dividends an amount of money sufficient to redeem on the first day of July next following two and one-half per cent (2½%) of the maximum aggregate amount of Preference Stock which shall have been issued prior to said May 15, regardless of whether all of such previously issued Preference Stock shall then be outstanding. The amount of money so made available shall be applied to the redemption on such July 1st of shares of Preference Stock determined by lot or pro rata. In any year during which this sinking fund provision shall be operative, the Corporation, instead of making available all or part of said amount in cash, may surrender to the sinking fund, not later than May 15th, shares of Preference Stock, which, after being outstanding, have been purchased or otherwise acquired by the Corporation and have not previously been surrendered to the sinking fund, and the Corporation shall be credited against the cash sinking fund requirement for that year with a sum equal to the redemption price as of July 1st of the shares of Preference Stock so surrendered to the sinking fund. No Preference Stock shall be purchased or redeemed under this provision or otherwise during the continuance of any default in the payment of cumulative dividends on the Preference Stock. All Preference Stock redeemed by the sinking fund or otherwise or surrendered to the sinking fund shall be transferred into the name of the Corporation and shall not be reissued or otherwise disposed of, and no Preference Stock shall be issued in lieu thereof, and the Corporation may from time to time take such action (if any) as may be necessary to cause all such shares so redeemed or surrendered to be retired in any manner permitted by law.

(j) No holder of Common Stock and no holder of Preference Stock shall be entitled, as such, as a matter of right, to subscribe for or purchase any part of any new or additional issue of Com-

mon Stock, Preference Stock, or any other class of stock whatsoever, or of securities convertible into or evidencing the right to purchase any such class of stock, whether now or hereafter authorized, or whether issued for cash, property or services, or otherwise; except that no shares of Common Stock or of any new class of Common Stock and no securities convertible into or evidencing the right to purchase such stock shall be issued for money without being offered for subscription pro rata to the holders of the outstanding Common Stock.

(k) In case for the fiscal year ended December 31, 1925, and for any subsequent fiscal year ending on January 31, ten percent (10%) of the Corporation's net earnings (computed as provided in paragraph (g) of Article 5 hereof, but excluding, in the case of properties acquired by the Corporation or its subsidiaries during such fiscal year, such part of the net earnings of such properties as apply to the portion of such fiscal year prior to their acquisition) shall exceed the amount of money to be made available for the sinking fund on the May 15th next following to redeem two and one-half percent (2½%) of the maximum aggregate amount of Preference Stock which shall have been issued prior to such May 15th, then the Corporation on such May 15th shall also make available for the sinking fund out of its surplus which would at the time be legally available for the declaration of dividends, an additional amount of money equal to the excess of ten percent (10%) of such net earnings over the two and one-half percent (2½%) of such maximum aggregate amount of Preference Stock (with the same privilege to the Corporation of surrendering Preference Stock instead of making all or part of said additional amount available in cash as in the case of the other amount to be made available to the sinking fund).

Fifth. The number of shares of each class issued and outstanding is as follows: Seventeen thousand nine hundred and seventy-three (17,973) shares of Preferred or Preference Stock and Seventy-one thousand eight hundred (71,800) shares of Common Stock.

Sixth. The total number of shares including those previously authorized, which the Corporation may henceforth have is: One hundred and twenty-one thousand (121,000) shares, of which Twenty-one thousand (21,000) shares are to have a par value of Seventy-five ($75.00) Dollars each; and of which One hundred thousand (100,000) shares are to have a par value of One ($1.00) Dollar each.

Seventh. The Twenty thousand (20,000) previously authorized shares of Preferred or Preference Stock of a par

value of One hundred ($100.) Dollars each issued or unissued are changed into Twenty-one thousand (21,000) shares of Preferred Stock with a par value of Seventy-five ($75.00) Dollars each hereby authorized, and One hundred thousand (100,000) previously authorized shares of Common Stock without par value issued or unissued are changed into One hundred thousand (100,000) shares of Common Stock with a par value of One ($1.00) Dollar per share hereby authorized.

Eighth. The One hundred twenty-one thousand (121,000) shares which the Corporation may henceforth issue are to be classified and reclassified as above stated into Twenty-one thousand (21,000) shares of Preferred Stock with a par value of Seventy five ($75.00) Dollars each and One hundred thousand (100,000) shares of Common Stock with a par value of One ($1.00) Dollar each; and the designations, preferences, privileges and voting powers of the shares of each class, and the restrictions or qualifications thereof are as follows:

DIVISION "A"—PREFERRED STOCK.

(1) Dividends: The holders of the Preferred Stock shall be entitled to receive, out of the surplus or net earnings of the corporation, if, when and as declared by the Board of Directors in its discretion, preferential dividends at the fixed rate of Six ($6.00) Dollars per share per annum and no more, payable semi-annually, on the first days of January and July in each year, as the Board of Directors may from time to time determine, before any dividends shall be declared or paid upon, or set apart for, or other
41 distribution shall be ordered or made in respect of the Common Stock. Such dividends on the Preferred Stock shall be cumulative from January 1, 1937, so that, if full cumulative dividends on the outstanding Preferred Stock at the rate aforesaid from January 1, 1937 to the end of the then current dividend period shall not have been paid thereon or declared and a sum sufficient for the payment thereof set apart, the amount of the deficiency shall be fully paid, but without interest, or dividends upon the Preferred Stock in such amount shall be declared and a sum sufficient for the payment thereof set apart, before any dividends shall be declared or paid upon or set apart for, or any other distribution shall be ordered or made in respect of the Common Stock, and before any sums shall be paid or set apart for the redemption of less than all of the Preferred Stock then outstanding, or for the purchase or other retirement of any of the Preferred Stock as hereinafter provided. In the event of the issue of any additional shares of Preferred Stock subsequent to January 1, 1937, all dividends paid on the Preferred Stock prior to the issue of such addi-

tional shares and all dividends declared payable to holders of record of Preferred Stock of a date prior to such issue shall be deemed to have been paid in respect of the additional shares so issued. The first semi-annual dividend on the Preferred Stock shall be payable on July 1, 1937.

(2) Preference upon Liquidation, etc. (a) In the event of any voluntary liquidation, dissolution or winding up of the Corporation, or any reduction of its capital, resulting in any distribution of its assets to its stockholders, the holders of the Preferred Stock shall be entitled to receive, for each share thereof, out of the assets of the Corporation, whether from capital, surplus, or earnings available for distribution to its stockholders, an amount equal to One hundred and six and 50/100 ($106.50) Dollars per share, together with an amount equal to all dividends ac-
42 crued or in arrears thereon, whether or not earned, before any distribution of assets of the Corporation shall be made to the holders of the Common Stock; but the holders of Preferred Stock shall be entitled to no further participation in such distribution. If upon any such voluntary liquidation, dissolution, winding up of reduction, the assets of the Corporation, distributable as aforesaid among the holders of the Preferred Stock, shall be insufficient as to payment to them of the full preferential amounts aforesaid, then the entire net assets of the Corporation to be distributed shall be distributed ratably among the holders of the Preferred Stock in proportion to the full preferential amounts to which they are respectively entitled. As used herein, the expression "dividends accrued or in arrears" means, in respect of each share of the Preferred Stock an amount equal to Six ($6.00) Dollars per share, per annum from the date from which dividends thereon became cumulative to the date as of which the computation is to be made, less the aggregate amount (without interest) of all dividends theretofore paid (or deemed to have been paid) thereon, or declared and set aside for payment, in respect thereof. Nothing in this paragraph (2) (a) shall be deemed to prevent the purchase or redemption of Preferred Stock, in any manner permitted by law or herein provided for; provided, however, that anything in this certificate to the contrary notwithstanding, the Corporation shall not, so long as any shares of the Preferred Stock remain outstanding, purchase shares of its Common Stock. A consolidation or merger of the Corporation or a sale or transfer of substantially all of its assets as an entirety, shall not be regarded as a voluntary liquidation, dissolution or winding up of the Corporation, or as a reduction of its capital.

(b) In the event of any involuntary liquidation dissolu-
43 tion or winding up of the Corporation, or any reduction of its capital, resulting in any distribution of its assets to

its stockholders, the holders of the Preferred Stock shall be entitled to receive, for each share thereof, out of the assets of the Corporation, whether from capital, surplus or earnings available for distribution to its stockholders, an amount equal to One hundred ($100) Dollars per share, together with an amount equal to all dividends accrued or in arrears thereon, whether or not earned, before any distribution of assets of the Corporation shall be made to the holder of the Common Stock; but the holders of Preferred Stock shall be entitled to no further participation in such distribution. If upon any such involuntary liquidation, dissolution, winding up or reduction, the assets of the Corporation, distributable as aforesaid among the holders of the Preferred Stock, shall be insufficient as to payment to them of the full preferential amounts aforesaid, then the entire net assets of the Corporation to be distributed shall be distributed ratably among the holders of the Preferred Stock in proportion to the full preferential amounts to which they are respectively entitled. As used herein, the expression "dividends accrued or in arrears" means, in respect of each share of the Preferred Stock an amount equal to Six Dollars ($6.00) Dollars per share per annum from the date from which dividends thereon became cumulative to the date as of which the computation is to be made, less the aggregate amount (without interest) of all dividends theretofore paid (or deemed to have been paid) thereon, or declared and set aside for payment in respect thereof. Nothing in this paragraph (2) (b) shall be deemed to prevent the purchase or redemption of Preferred Stock in any manner permitted by law or herein provided for; provided, however, that anything in this certificate to the contrary notwithstanding, the Corporation shall not, so long as any shares of the Preferred Stock remain outstanding, pur-
44 chase shares of its Common Stock. A consolidation or merger of the Corporation, or a sale or transfer of substantially all of its assets as an entirety, shall not be regarded as an involuntary liquidation, dissolution or winding up of the Corporation, or as a reduction of its capital.

(3) Redemption and Purchase: Upon at least thirty (30) days' notice given both by mail to the record holders of the shares of Preferred Stock to be redeemed and by publication in two newspapers of general circulation in the Borough of Manhattan, the City of New York, State of New York, the Corporation may redeem all or any part of the shares of Preferred Stock at the time outstanding, by lot or pro rata, on any semi-annual dividend payment date, at the price (herein called redemption price) of One hundred six and 50 100 ($106.50) Dollars, per share, plus dividends accrued or in arrears to the designated redemption date, all

by such method as shall be provided from time to time by resolution of the Board of Directors or by the Bylaws of the Corporation. From and after the date fixed in such notice as the date of redemption, unless default shall be made by the Corporation, in providing moneys at the time and place specified for the payment of the redemption price pursuant to such notice, all dividends on the Preferred Stock thereby called for redemption shall cease to accrue and all rights of the holders thereof as stockholders of the Corporation, except the right to receive the redemption price, shall cease and determine, and such shares shall be deemed no longer to be outstanding. No redemption of Preferred Stock as herein provided shall be made or ordered unless full cumulative dividends at the fixed rate hereinabove specified upon all of the Preferred Stock then outstanding, which is not be redeemed, from the date from which dividends thereon became cumulative to the end of the then current dividend period, shall have been paid or declared and a sum sufficient for the payment thereof set
45 apart. The Corporation may, also, from time to time, purchase shares of its Preferred Stock either through the Retirement Fund in the manner and subject to the terms as hereinafter provided for, or from any other funds available for such purpose and not exceeding the price at which the same may be redeemed. Shares of Preferred Stock redeemed, or in any manner purchased or acquired by the Corporation, whether through purchase upon conversion or otherwise, shall not be reissued by it, but shall be cancelled and retired in the manner permitted by law.

(4) Retirement or Sinking Fund: On or before the one hundred and twentieth (120th) day after the close of the Corporation's fiscal year ending in 1938, and on or before the corresponding day after the close of each fiscal year thereafter, so long as any shares of the Preferred Stock shall be outstanding, the Corporation shall set apart out of its net earnings, if any, of each fiscal year, for the purchase of its Preferred Stock, a sum sufficient to provide a fund (hereinafter sometimes called the Retirement Fund) equal to twelve and one-half ($12\frac{1}{2}\%$) per centum of the consolidated net earnings of the Corporation for such fiscal year after deducting therefrom an amount equal to the full cumulative dividend requirement for such year, at the fixed rates hereinabove specified, upon all shares of Preferred Stock then outstanding during such year. Said sum shall be set apart (a) only after full cumulative dividends on all of the Preferred Stock then outstanding, at the fixed rates hereinabove specified, from the date from which dividends thereon became cumulative to the end of the then current dividend period shall have been paid or declared and a sum sufficient for the payment thereof set apart and (b) in each instance before any dividends shall be declared

or paid upon or set apart for the Common Stock, or any
46 other distribution ordered or made in respect thereof. If the Corporation shall, in any year or years have consolidated net earnings but shall not for any reason set apart for the Retirement Fund a sum equal to twelve and one-half (12½%) per centum of such consolidated net earnings, if any, after deducting therefrom all cumulative Preferred Stock, dividend requirements, as above provided, the obligation of the Corporation to set apart such sum shall be cumulative so that, if the full amount required to be set apart as aforesaid in each such year for the Retirement Fund shall not be so set apart, the deficiency shall be made good before any dividends shall be declared or paid upon or set apart for the Common Stock, or any other distribution ordered or made in respect thereof. The amount so set apart for the Retirement Fund shall be applied from time to time by the Corporation, during the twelve months period following the date said amount is so set apart (whether on or prior or subsequent to the date above mentioned, to the purchase, directly or through agents, of Preferred Stock in the open market or at public or private sale, as the Corporation shall in its discretion determine, at the lowest price at which it may be offered but in no case at more than One hundred and six and 50/100 ($106.50) Dollars per share, but if no shares of Preferred Stock shall be offered for sale to the Corporation at or below the price of One hundred and six and 50/100 ($106.50) Dollars per share, the Board of Directors may, at their option, allow the Retirement Fund to accumulate, or they may use any portion or all of it for the purchase, in their discretion, of outstanding Preferred Stock by calling in such Preferred Stock for redemption at prices not exceeding the redemption price and in the manner and method set forth in paragraph (3) of Division "A" above; provided, however, that no
47 purchase of Preferred Stock may be made through the Retirement Fund if the Corporation is at the time in default in the payment of full cumulative dividends on its Preferred Stock; and provided, further, that said twelve month period shall be extended by such period of time as the Corporation shall be in default in the payment of full cumulative dividends on its Preferred Stock. In the handling of the Retirement Fund, the amount so set apart in respect of any fiscal year shall be segregated on the books of the Corporation from the amount so set apart in respect to any other fiscal year, and purchases of Preferred Stock, through such Fund shall be charged against unexpended balances of amounts so set apart and then in such fund in the order in which they were so set apart.

If the holder of any stock so called for redemption shall refuse or neglect to surrender the certificate for the same upon the ex-

piration of thirty (30) days' notice by mail to the holder of record, the Corporation may deposit the purchase price of the stock to the credit of such holder in any bank or trust company authorized to do business in the State of New York and upon such deposit made as aforesaid, and notice thereof mailed to the stockholder, his right to share in the future profits of the Corporation by way of dividends or otherwise, or to participate in any distribution of capital assets, shall cease and determine and he shall have no other or further right or recourse against the Corporation on account of such stock. Any moneys so deposited which shall remain unclaimed by the holders of such Preferred Stock, at the end of six (6) years after the redemption date, together with any interest thereon that shall have been allowed by the bank or trust company with which the deposit shall have been made, shall be paid by said bank or trust company to the Corporation.

(5) Restriction on certain corporate action: In addition
48 to any other provisions or consents required at the time by Statute, the Corporation shall not, without the affirmative vote of the holders of record of at least two-thirds ($\frac{2}{3}$) in interest of the Preferred Stock at the time outstanding, given in person or by proxy, at a special meeting called for the purpose, at which the Preferred Stock shall vote separately as a class:

(a) Authorize, create, or issue any new class of stock having any preference or priority which is or would be superior to or on an equality with any preference or priority of the Preferred Stock, provided herein; or authorize, create or issue any obligation or security convertible into or evidencing the right to purchase any stock having any such preference priority or equality; provided, however, that the provision of this subparagraph (a) shall not apply to the authorization, creation or issuance of additional shares of such Preferred Stock; or

(b) Issue any shares of Preferred Stock in excess of a total of Twenty-one thousand (21,000) shares, provided that such affirmative vote shall not be necessary for effecting or validating any such issue if the net earnings of the Corporation (and its subsidiaries, if any, upon a consolidated basis), plus the net earnings of the properties, if any, to be acquired by all or any part of the proposed issue of Preferred Stock or the proceeds thereof shall for a period of twelve (12) successive calendar months ending within the ninety (90) days immediately preceding such issue, amount to not less than two and one-half times, or shall for a period of twenty-four (24) successive calendar months ending within the ninety (90) days immediately preceding such issue, amount to five times the aggregate annual dividend requirements on the shares of Preferred Stock outstanding and those then proposed to be issued; or

(c) Amend this certificate by which the preferences of the Preferred Stock would be altered or changed; or

(d) Create any mortgage, lien, charge or encumbrance of any kind upon any part of the real or personal property of the Corporation or of any subsidiary, or the creation of any bonds, notes, or other evidences of indebtedness maturing more than eighteen months from the date of issue; provided, however, that this restriction shall not apply to:

I. The giving of purchase money mortgages or other purchase money liens on property that may hereafter be acquired by the Corporation or any subsidiary; or the renewal or refunding of such mortgages; or

II. The acquiring of property subject to mortgages, liens, charges or encumbrances thereon then existing; or the renewal or refunding of such mortgages; or

III. The pledging or otherwise encumbering by the Corporation or by any subsidiary, as security for loans made to it in the regular and current conduct of its business, of notes, accounts receivable, merchandise stocks, bonds or other securities or other liquid assets owned by it, other than obligations, securities or stocks of any subsidiary.

When under the provision of subparagraph (b) of this paragraph (5), the net earnings of the Corporation (and its subsidiaries, if any, upon a consolidated basis) are required to be computed for a stated period, and any properties have been acquired by the Corporation or its subsidiaries which were not owned by the Corporation or its subsidiaries during all or part of the period for which such computation is to be made, then and in every such case the net earnings of such properties during the entire period for which the computation is to be made shall be treated and considered as part of the net earnings of the Corporation for such period.

(6) Voting Power: Except as otherwise provided in this Certificate of Incorporation and any amendment or amendments thereto, or as otherwise required by law, the Preferred Stock shall have no right to vote for the election of directors or for any other purpose (including a proceeding for mortgaging the property and franchises of the Corporation, for guaranteeing the bonds of another corporation, for the sale of the franchises and property, for establishing priorities, or creating preferences among the several classes of stock, for consolidation, for voluntary dissolution, or for change of name), and shall not be entitled to receive notice of any meeting of stockholders, and all voting rights for the election of directors, except as herein provided for, and for author-

izing any corporate action whatsoever required to be authorized by the stockholders, and for all other purposes, shall be vested exclusively in the Common Stock, subject to whatever rights of voting otherwise given in this Certificate to the holders of Preferred Stock, provided, however, that if and whenever three semi-annual dividends on the Preferred Stock shall be unpaid in whole or in part, then the Preferred Stock shall be entitled to the exclusive voting rights for the election of directors, until all arrears in dividends on the Preferred Stock shall have been paid in full and the semi-annual dividend thereon for the current semi-annual dividend period shall have been declared and set apart in full (which shall be done as expeditiously as practicable), and thereupon the exclusive voting right for the election of directors shall be divested from the Preferred Stock and revested in the
51 Common Stock, subject, however, as long as Twenty-five per cent (25%) of the total authorized issue of Preferred Stock is issued and outstanding, to the right of the holders of said Preferred Stock to elect one-third of the members of the Board of Directors, provided, however, that if the total number of directors is not divisible by three, the number of the directors which the Preferred stockholders may by right elect shall be one-third of the number so divisible less than the total number of directors to be elected.

In any case where the Preferred Stock shall become vested with the exclusive voting right for the election of directors, a meeting of the Preferred stockholders shall forthwith be called, and at such meeting the Preferred stockholders may, by a vote of a majority of all the shares of Preferred Stock issued and outstanding, remove from office all directors then holding office and elect a new board of directors.

Similarly, in any case where the Common Stock shall become revested with the exclusive voting right for the election of directors, a meeting of the Common stockholders shall forthwith be called; and at such meeting the Common stockholders may, by a vote of a majority of all the shares of Common Stock outstanding, remove from office all directors then holding office and elect a new board of directors, subject to the rights of the holders of the Preferred Stock to elect a proportionate number of members of said board as hereinbefore set forth.

Each stockholder entitled to vote at any particular time in accordance with the foregoing provisions, shall have one vote for each share of the stock at the time entitled to voting rights held of record by him on the date fixed for determining voting rights.

52 DIVISION "B"—COMMON STOCK

(1) Dividends: After full cumulative dividends on the Preferred Stock shall have been paid or set apart for payment in accordance with paragraph (1) of Division "A" above and after there shall have been set apart an amount or amounts sufficient to provide for the Retirement Fund as required by paragraph (4) of Division "A" above, dividends may be declared and paid upon the Common Stock after January 1, 1937, if, when and as declared by the Board of Directors, out of the surplus or net earnings of the Corporation; provided that in determining the amount of such surplus there shall not be included:

(I) Surplus arising from an increase in the value of any assets, unless actually realized upon sale or other disposition thereof; or

(II) Surplus used for the purchase or the acquisition by the Corporation of shares of any class of its stock, other than Preferred Stock or created or growing out of the acquisition or redemption by the Corporation of shares of any other class of its stock; or

(III) Surplus arising from any change in par value, stated capital or capital attributable to its shares of stock of any class.

(2) Distribution of Assets: In the event of liquidation, dissolution, or winding up of the Corporation, or any reduction of its capital, resulting in a distribution of its assets to its stockholders, whether voluntary or involuntary, after there shall have been paid to, or set apart for the holders of the Preferred Stock the full preferential amount to which they are respectively entitled under the provisions of paragraphs (2) and (3)
53 of Division "A", above, the remaining net assets are to be distributed pro rata among holders of the Common Stock.

(3) Voting Power: Except as provided in paragraphs (5) and (6) of Division "A" above, the holders of the Common Stock shall possess full voting power for the election of Directors and for all other purposes.

DIVISION "C"—GENERAL PROVISIONS

(1) No holder of Preferred Stock and no holder of Common Stock shall be entitled, as such a matter of right, to subscribe for, or purchase any part of any new additional issue of Preferred Stock, or Common Stock, or any other class of stock whatsoever or of securities convertible into or evidencing the right to purchase any such class of stock, whether now or hereafter authorized, or whether issued for cash, property or services or otherwise, except

that no shares of Common Stock or of any new class of Common Stock and no securities convertible into or evidencing the right to purchase such stock shall be issued for money, without being offered for subscription pro rata to the holders of the outstanding Common Stock.

(2) All shares of Preferred Stock and Common Stock of the Corporation not to be outstanding after giving effect to the change or re-classification herein provided for shall be available for issuance by the Corporation in accordance with the statutes which in such case may provide.

(3) The phrase "consolidated net earnings of the Corporation" as used in this certificate shall be deemed to mean the net earnings of the Corporation and its subsidiaries for the fiscal year 54 in question, calculated on a consolidated basis in accordance with sound accounting practice, as shown by a statement duly certified or verified by an independent firm of certified public accountants or public accountants approved by the Board of Directors of the Corporation; and the term "subsidiary" or "subsidiaries" as used herein this certificate shall be deemed to mean any corporation or corporations not less than a majority of the outstanding stock of which having power to elect a majority of its Board of Directors (at all times or except in the event of default in the payment of dividends on any stock) shall at all times be owned by the Corporation and or any other subsidiary or subsidiaries.

(4) No fractional shares of the Preferred Stock or Common Stock shall be issued. If rights to fractions of shares of Preferred Stock or Common Stock result from such re-classification and change, the Corporation shall for each such fractional share, issue and deliver to each holder of the hereinbefore authorized 7% Cumulative Preferred or Preference Stock entitled thereto, a scrip certificate or certificates representing such fraction of a share, which, when surrendered with other similar scrip certificates within five years from December 31, 1936, shall entitle the bearer to receive from the Corporation in exchange therefor a certificate for the full number of shares called for by such scrip certificates in the aggregate. Such scrip certificates shall not entitle the bearer thereof to any dividends or voting rights or any other or different powers, rights or privileges of the stock of the Corporation and shall be void after five (5) years from December 31, 1936.

(5) All shares of whatever class of stock which may hereafter be issued by the Corporation shall be deemed "full paid and non-assessable" shares.

55 Tenth. The statements respecting its capital contained in the last certificate filed pursuant to law by said Corporation, are as follows:

The capital of the Corporation shall be at least equal to the sum of the aggregate par value of all issued shares having par value plus $5.00 in respect to every issued share without par value, plus such amounts as from time to time by resolution of the Board of Directors may be transferred thereto.

The Corporation may issue and sell its authorized shares without par value for such consideration as, from time to time, may be fixed by the Board of Directors. Any and all shares without par value so issued shall be deemed fully paid and nonassessable and the holder of such shares shall not be liable to the Corporation or to its creditors in respect thereto.

Eleventh. The amount of capital stock shall hereafter be One million six hundred fifth-three thousand four hundred twenty-four ($1,653,124.00) Dollars.

In witness whereof, we have made, subscribed and acknowledged this certificate this—day of—, 1936.

Further resolved, that when the amendment of the Certificate of Incorporation of the Company, as aforesaid, shall become effective the officers of the Corporation be, and they hereby are authorized and empowered to issue and deliver to the holders of 7% Cumulative Preferred or Preference Stock of record as of the close of business December 31, 1936, in exchange for each one share thereof, one and one-sixth shares of the fully paid and non-

56 assessable Cumulative Preferred Stock with a par value of Seventy-five ($75.00) Dollars per share, and one-half ($1/2) share of the One ($1.00) Dollar par value Common Stock and $15.08 in cash, in full liquidation, satisfaction and discharge of the 7% Cumulative Preferred or Preference Stock and all dividends accumulated and in arrears thereon, to and including December 31, 1936, and all other rights, preferences or claims thereon; and to issue and deliver to the holders of the no par value Common Stock of record as of the close of business December 31, 1936, in exchange for each one share thereof, one share of the Common Stock with a par value of One ($1.00) Dollar per share, in full liquidation, satisfaction and discharge of the no par value Common Stock and of all rights, preferences and claims thereon;

Further resolved, that the officers of the Company be, and they hereby are, authorized and empowered to sign such certificates, agreements and other documents as may be necessary, including changes, or modification in the foregoing amendment of the Cer-

tificate of Incorporation, as may be necessary and to affix the Corporation's seal to any and all thereof, and to take such other and further steps or action as may be deemed necessary to effectuate any or all of the foregoing;

Further resolved, that a Special Meeting of the stockholders of the Company be, and it hereby is called to be held at the principal and registered office of the Company at Madison Avenue and 45th Street, New York City, on December 8, 1936, at eleven o'clock A. M. for the purpose of considering and acting upon the foregoing resolution; that the Stock Transfer Books shall not be closed but that only stockholders of record at the close of business on November 18, 1936, shall be entitled to vote thereat or at any adjournment or adjournments thereof.

57 *Exhibit B, annexed to stipulation of facts*

ABERCROMBIE & FITCH COMPANY

MADISON AVENUE AT 45TH STREET

NEW YORK

DECEMBER 9, 1936.

To the Holders of Certificates for 7% Preferred or Preference Stock and Common Stock of Abercrombie & Fitch Company:

Announcement is hereby made to you that the plan of Recapitalization of your Company recently submitted to you was approved at the special meeting of the Stockholders in New York on December 8, 1936, by more than two-thirds majority of both Preferred or Preference and Common Stockholders.

The amendment to the Certificate of Incorporation approved at the meeting became effective on December 9th, 1936. A certificate for one share of the old Preferred or Preference Stock now entitles the holder thereof to certificates for one and one-sixth shares of the new Preferred Stock and one-half share of Common Stock and to a cash payment of $15.08 per share.

A certificate for one share of the old no par value Common Stock now entitles the holder thereof to a certificate for one share of the new par value Common Stock.

Certificates for the new shares can be delivered and the cash payment of $15.08 per share of the old Preferred or Preference Stock can be made only upon surrender and cancellation of cer-

tificates for the old Preferred or Preference Stock. Likewise, certificates for the new shares of the par value Common Stock can be delivered only upon surrender and cancellation of certificates for the old no par value Common Stock. The exchange of certificates and the cash payment will be effected for the Company by the Irving Trust Company, Agent, Corporate Trust Department, 1 Wall Street, New York City, N. Y., to which the stockholders are requested to send their certificates for old Preferred or Preference Stock, or the Old Common Stock. The new certificates will be delivered on or about January 15, 1937, at which time the cash payment of $15.08 per share will also be made.

All certificates for the old Preferred or Preference Stock and Common Stock should be accompanied by the Letter of Transmittal attached hereto, filled out in accordance with the instructions thereon.

As provided by the amendment to the Company's certificate of Incorporation, no certificates for fractions of a share of the new Preferred and Common Stock will be issued. Stockholders will receive scrip certificates for fractions of shares, and the Company will assist the holders thereof in rounding out their holdings into full shares. Scrip certificates calling in the aggregate for any number of full shares may be exchanged for full share certificates at the office of the Irving Trust Company, Corporate Trust Department, 1 Wall Street, New York City, N. Y., mentioned above at any time on or before January 15, 1941.

I wish to take this opportunity to thank the Stockholders for their prompt and enthusiastic support of the Plan of Recapitalization submitted to them. The position of the Company in the trade and with its customers I feel will be greatly improved by this step, and you may rest assured that all the energies of the management are being devoted in every way toward further improvement of the profits.

Respectfully yours,

J. S. COBB, *President.*

Exhibit C, annexed to stipulation of facts

ABERCROMBIE & FITCH COMPANY

SUMMARY OF SURPLUS ACCOUNT

For the Period from January 1, 1913 to January 31, 1936

Balance, January 1, 1913		$8,170.25
Credits:		
Net income	$2,443,123.50	
Reserves restored to surplus including adjustments of accounts receivable reserves	225,880.87	
Sinking fund redemption of preferred stock of Abercrombie and Fitch Company below par	14,900.00	
Other:		
Value of common stock of the Abercrombie and Fitch Company donated to the Company	12,900.00	
Excess of sale price of original issue of capital stock of Abercrombie and Fitch Company, sold in 1929 and 1930, over par value of said stock	53,169.70	
Cancellation of indebtedness to subsidiary company	21,225.21	
Proceeds of life insurance policy—net	35,082.50	
Miscellaneous adjustments for taxes, bad debt reserves, etc	25,383.96	2,831,659.54
Total credits		$2,839,829.79
Debits:		
Cash dividends	$1,208,325.05	
Common stock dividends paid in common stock on April 30, 1920	$161,700.00	
Common stock dividends paid in preferred stock:		
February 20, 1928	323,400.00	
January 21, 1930	359,000.00	844,100.00
Reserves	168,745.03	
Goodwill written off	27,383.80	
Investments in subsidiary real estate companies written off	839,826.61	
Miscellaneous—additional taxes, commissions, etc	451,221.17	3,239,601.66
Balance, January 31, 1936		$399,771.87

(Figures in italics were red in original.)

61 In the Tax Court of the United States

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 107302. Promulgated January 26, 1943.

Cash distributed as part of a tax-free exchange of stock under section 112 (b) (3) of the Revenue Act of 1936 pursuant to a plan of recapitalization held taxable as a dividend under section 112 (c) (2) where the corporation, disregarding charges to surplus account upon the issuance of nontaxable stock dividends in prior years (see section 115 (b)), had sufficient earnings and profits accumulated since February 28, 1913, to cover the cash distribution.

H. S. McKinney, Esq., for the petitioner.
H. C. Clark, Esq., for the respondent.

Opinion

ARUNDELL, Judge: The Commissioner determined an income tax deficiency for the calendar year 1937 in the amount of $13,887.24. The sole issue is whether cash of $45,240 received by petitioner pursuant to a plan of recapitalization is taxable as a dividend, as determined by respondent, or as capital gain to the extent of 40 percent thereof, as reported by petitioner. The material facts are stipulated and may be briefly summarized.

Petitioner is the executor of the estate of Edward T. Bedford, who died May 21, 1931. Its income tax return for 1937 was filed with the collector for the second district of New York.

62 In 1937 petitioner owned 3,000 shares of 7 percent cumulative preferred stock of the Abercrombie & Fitch Co., having a par value of $100 per share. The stock had been owned by Bedford at the time of his death and at that time it had a fair market value of $210,000. In accordance with a plan of recapitalization duly approved by the directors and stockholders of the Abercrombie & Fitch Co., petitioner in January 1937 exchanged its 3,000 shares of 7 percent cumulative preferred stock for 3,500 shares of $6 cumulative preferred stock with a par value of $75, 1,500 shares of common stock, and cash in the amount of $45,240. The fair market value of the securities and cash received by petitioner under said plan was $349,740. The number of shares of 7

7 percent cumulative preferred stock outstanding at the time of the recapitalization was 17,973. The cash payable to the holders of such shares upon the exchange was at the rate of $15.08 per share, or a total on the outstanding shares of $271,032.84.

On January 31, 1936, the surplus account on the books of the Abercrombie & Fitch Co., showed a deficit of $399,771.87, after the deduction of three stock dividends. There had been charged to surplus account the following amounts upon the issuance of stock dividends: $161,700 on April 30, 1920, upon the issuance of a common stock dividend paid in common stock; and the amounts of $323,400, and $[illegible] upon the issuance on February 20, 1928, and January 21, 1930, respectively, of common stock dividends paid in preferred stock. The company's surplus account on January 1, 1913, had a balance of $8,170.25. For its fiscal year ended January 31, 1937, the company had net earnings of $309,073.70 after taxes.

The parties are agreed that the exchange of stock for stock pursuant to the plan of recapitalization was a nontaxable transaction under section 112 (b) (3) of the Revenue Act of 1936. Petitioner concedes that gain in excess of the amount of cash received was realized upon the exchange and that, therefore, the cash is to be "recognized" as taxable gain under the provisions of section 112 (c) as "other property or money." It maintains, however, that subdivision (1) of section 112 (c) governs; that consequently the recognized gain is taxable as a capital gain, limited by the provisions of section 117 (a). Respondent takes the view, and has so determined, that the distribution of the cash had "the effect of the distribution of a taxable dividend," and as such is to be taxed as a dividend under the plain language of subdivision (2) of section 112 (c). The material provisions of the statute are set forth below.[1]

63

[1] SEC. 112. RECOGNITION OF GAIN OR LOSS.

(b) EXCHANGES SOLELY IN KIND.—

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(c) GAIN FROM EXCHANGES NOT SOLELY IN KIND.

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

Petitioner has failed to demonstrate any error in the Commissioner's determination. Its principal position is
64 that the cash distributed did not have the effect of a taxable dividend because the distributing corporation had no earnings or profits accumulated since February 28, 1913, with which to pay dividends. While it is true that the books showed a deficit on January 31, 1936, of nearly $400,000, it is undisputed that the amount of $844,100 had been charged to earnings upon the issuance of stock dividends in prior years. Since these dividends were tax-free, the first one under the rule of Eisner v. Macomber, 252 U. S. 189, and the last two under the revenue act in force when they were made,[1] they do not serve to reduce earnings and profits available for future distribution. There were thus earnings and profits in January 1937 greatly in excess of the cash payment connected with the recapitalization.

Petitioner argues with respect to two of the stock dividends, which took the form of preferred stock on common stock, that the distributions constituted income under the Sixteenth Amendment, Koshland v. Helvering, 298 U. S. 441, Helvering v. Gowran, 302 U. S. 238, and that, therefore, they were distributions of earnings and profits, even though the revenue act then in force saw fit to exempt them from tax. This argument completely overlooks section 115 (h) of the Revenue Act of 1936, which provides as follows:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * * * *

(h) EFFECT ON EARNINGS AND PROFITS OF DISTRIBUTIONS OF STOCK.—The distribution (whether before January 1, 1936, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities or stock or securities in
65 another corporation shall not be considered a distribution of earnings or profits of any corporation—

(1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, or

(2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

This section is merely an enactment of what the law had been for many years prior to 1936. Senate Rept. 2156, 74th Cong., 2d sess., p. 19; August Horrmann, 34 B. T. A. 1178, 1184; F. J. Young Cor-

[1] Revenue Act of 1928, sec. 115 (f):
(f) STOCK DIVIDENDS.—A stock dividend shall not be subject to tax.

poration, 35 B. T. A. 860; affd., 103 Fed. (2d) 137; Mertens Law of Federal Income Taxation, vol. 1, § 9.47; John K. Bretta, 1 T. C. 86.

Petitioner also appears to argue that there was a mere exchange pursuant to a plan of recapitalization and that cash distributed in an exchange can not be treated as a dividend, citing Humphreys Manufacturing Co., 45 B. T. A. 114. But section 112 (c) (2) applies by its terms not to distributions which take the form of a dividend, but to any distribution which has the effect of the distribution of a taxable dividend. It contemplates the very situation under consideration, for it is applicable only if a distribution falls first within section 112 (c) (1), and a transaction falls within that subdivision only if it is part of "an exchange * * * within the provisions of subsection (b) (1), (2), (3), or (5) of this section." In other words, the statute itself requires that a distribution of cash or property in connection with an
66 exchange of stock for stock to be taxed as a dividend if it has that effect.[1] We think the distribution under consideration clearly falls within section 112 (c) (2). Love v. Commissioner, 113 Fed. (2d) 236; J. T. Owens, 27 B. T. A. 469, 474; affd., 69 Fed. (2d) 597. The case relied upon by petitioner, Humphreys Manufacturing Co., supra, was decided on a failure of proof. It followed J. Weingarten, Inc., 44 B. T. A. 788, 809, which recognized that cash distributed under similar circumstances had the effect of the distribution of a dividend. To the same effect is the more recent case of Knapp Monarch Co., 1 T. C. 59.

67 Petitioner's final argument, as we understand it, is that the cash payment should not be treated as a dividend, because the company had a book deficit and was thereby prohibited by state law from declaring dividends. Petitioner contends that an ordinary dividend would not and could not be declared, and it is urged that it would be improper to regard a dis-

[1] Section 112 (c) (2) had its origin in section 203 (d) (2) of the 1924 Act. Its purpose, as stated in House Report 179, 68th Cong., 1st sess., pp. 14, 15, as follows:

"(2) There is no provision of the existing law which corresponds to paragraph (2) of subdivision (d). This subdivision provides that any amount distributed by a corporation in connection with a reorganization which has the effect of a taxable dividend shall be taxed as a dividend and not as a taxable gain.

"The necessity for this provision may best be shown by an example: Corporation A has capital stock of $1,000,000, and earnings and profits accumulated since March 1, 1913, of $500,000. If it distributes the $500,000 as a dividend to its stockholders, the amount distributed will be taxed at the full surtax rates.

"On the other hand, Corporation A may organize Corporation B, to which it transfers all its assets, the consideration for the transfer being the issuance by B of all its stock and $500,000 in cash to the stockholders of Corporation A in exchange for their stock in Corporation A. Under the existing law, the $500,000 distributed with the stock of Corporation B would be taxed, not as a dividend, but as a capital gain, subject only to 12½ per cent rate. The effect of such a distribution is obviously the same as if the corporation had declared out as a dividend its $500,000 earnings and profits. If dividends are to be subject to the full surtax rates, then such an amount so distributed should also be subject to the surtax rates and not to the 12½ per cent rate on capital gain. Here again this provision prevents evasions."

tribution made in connection with a reorganization as a dividend when under state law a dividend could not legally be declared. The answer to this argument is plain. The revenue act has its own definition of a dividend. The corporation, for purposes of Federal income taxation, had a substantial surplus rather than a deficit; any distribution by a corporation having earnings or profits is presumed by section 115 (b), for the purposes of Federal income taxation, to have been out of those earnings or profits; and any such distribution is declared by section 115 (a) to be a dividend. In the instant case the corporation had a surplus in the eyes of the revenue act and there was a distribution of cash among its shareholders. The distribution did not take the form of an ordinary dividend, governed by section 115 (a) and (b), but its effect was precisely the same. It, therefore, falls within the express and unambiguous language of section 112 (c) (2).

The Commissioner is sustained in his determination.

Decision will be entered for respondent.

68 In the Tax Court of the United States

Decision

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated January 26, 1943, it is

Ordered and decided: That there is a deficiency in income tax of $13,887.24 for the calendar year 1937.

Enter:

Entered January 27, 1943.

(S) J. E. MURDOCK, *Judge.*

In United States Circuit Court of Appeals, Second Circuit

Petition for review and assignments of error

To the Honorable, Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor, by its attorney, Holt S. McKinney, hereby files its petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of The Tax Court of the United States entered January 27, 1943, determining a deficiency in federal income tax of your petitioner for the year 1937 in the amount of $13,887.24, and respectfully shows:

69

JURISDICTION AND VENUE

This petition is filed pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

Your petitioner is the Executor of the Last Will and Testament of Edward T. Bedford and is a corporation organized and existing under the laws of the State of New York with its principal office at 176 Broadway, Borough of Manhattan, City and State of New York. The federal income tax return for the estate of the said Edward T. Bedford for the year 1937, which is the return of the tax in respect of which the liability involved herein arises, was made to the Office of the Collector of Internal Revenue of the United States for the Second District of New York, which is located in New York, New York, and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States holding his office by virtue of the laws of the United States.

II

NATURE OF THE CONTROVERSY

The sole issue presented by the petition for review is whether the cash payment of $45,240 received by petitioner in 1937 from the reorganization of the Abercrombie & Fitch Company had "the effect of the distribution of a taxable dividend." The petitioner contends that this $45,240 cash amount, in respect of which The Tax Court determined the deficiency in tax, constituted a gain from exchange, taxable as a capital gain in accordance with the provisions of sections 112 (c) (1) and 117 (a) of the Revenue Act of 1936, but the respondent contends that it is taxable as a dividend under section 112 (c) (2) of the Revenue Act of 1936.

In the early years of the depression the Abercrombie & Fitch Company incurred heavy losses, as a result of which it had an accumulated deficit in its surplus account per books on January 31, 1936 of $599,771.87.

Due to the existence of this deficit, the president of Abercrombie & Fitch Company felt that its position in the trade and with its customers was being affected. The company had been unable for over five years to pay any dividend on either its preferred or common stocks. Accordingly, a "Plan of Recapitalization" of the company was proposed and submitted to stockholders for their

consideration and approval. This plan was approved by the stockholders of the Abercrombie & Fitch Company at a Special meeting called for that purpose and held on December 8, 1936. This "Plan of Recapitalization" had the following four-fold business purpose:

To enable the Abercrombie & Fitch Company to eliminate the surplus deficit on its books.

To prepare the way for the resumption of dividend payments on its stock.

To eliminate the accumulated arrears of dividends on its 7% cumulative preferred stock.

To improve the position of the company in the trade and with its customers.

At the time this recapitalization plan became effective, your petitioner owned 3,000 shares of 7% cumulative preferred stock (par value $100 per share) of the Abercrombie & Fitch Company, which shares of stock had been acquired by the said Edward T. Bedford prior to his death and were owned by him at the time of his death. Edward T. Bedford died on May 21, 1931 and the fair market value on that date of said 3,000 shares of 7% cumulative preferred stock of Abercrombie & Fitch Company was $210,000.

In accordance with the "Plan of Recapitalization" duly approved at a special meeting of the stockholders of Abercrombie & Fitch Company held on December 8, 1936, your petitioner exchanged its 3,000 shares of 7% cumulative preferred stock (par value $100 per share) in January 1937 for 3,500 shares of $6 cumulative preferred stock (par value $75 per share), 1,500 shares of common stock (par value $1 per share), and cash in the amount of $45,240. The fair market value of the securities and cash received by petitioner under said plan was $349,740. The number of shares of 7% cumulative preferred stock outstanding at the time of the recapitalization was 17,973. The cash payable to the holders of such shares upon the exchange was at the rate of $2.508 per share, or a total on the outstanding shares of $271,032.84.

From 1920 to 1930 inclusive, Abercrombie & Fitch Company declared and paid three stock dividends, upon the issuance of which its surplus account had been charged as follows: $161,700 on April 30, 1920, upon the issuance of a common stock dividend paid in common stock; and the amounts of $323,400 and $359,000 upon the issuance on February 20, 1928, and January 21, 1930, respectively, of common stock dividends paid in preferred stock. Though the above stock dividends were duly declared and paid out of surplus, the respondent herein contends that in determining the "effect" under section 112 (c) (2) of the Revenue Act of 1936 of the cash amount ($45,240) received by the petitioner from the

reorganization of Abercrombie & Fitch Company in 1937,
72 these stock dividends must be treated as restored to surplus account, because of the provisions of section 115 (h) of the Revenue Act of 1936. The Tax Court, contrary to your petitioner's contentions, sustained the respondent's determination and held that though the Abercrombie & Fitch Company had a surplus deficit, per books, at the time of the reorganization and could not have lawfully paid a dividend, nevertheless for the purpose of federal income tax, the cash of $45,240 which the petitioner received had "the effect of the distribution of a taxable dividend" within the meaning of section 112 (c) (2) of the Revenue Act of 1936. For its fiscal year ended January 31, 1937, the Abercrombie & Fitch Company had net earnings after taxes of $309,073.70.

III

Designation of Court of Review

Your petitioner, being aggrieved by the proceedings, findings of fact, opinion and decision of The Tax Court of the United States, requests a review thereof by the United States Court of Appeals for the Second Circuit. The jurisdiction and venue of this Court is shown in section I of this petition for review.

IV

Assignments of Error

Your petitioner avers that The Tax Court of the United States committed the following errors to the prejudice of your petitioner: The Tax Court of the United States erred:

1. In ordering and deciding that there is a deficiency
73 in income tax of your petitioner for the year 1937 in the amount of $13,887.24.

2. In failing to order and decide that there is no deficiency in income tax of your petitioner for the year 1937.

3. In holding that the receipt by your petitioner in 1937 of cash in the amount of $45,240, as a result of the exchange of its stock in the Abercrombie & Fitch Company pursuant to the "Plan of Recapitalization" approved by the stockholders of that company on December 8, 1936, had "the effect of the distribution of a taxable dividend."

4. In failing to find and hold that the Abercrombie & Fitch Company at the time of its reorganization in 1937 had a surplus deficit and therefore could not have distributed a taxable dividend.

5. In holding that the provisions of section 115 (h) of the Revenue Act of 1936 were controlling in determining the "effect" of the receipt by your petitioner in 1937 of cash of $45,240 due to the reorganization of Abercrombie & Fitch Company.

6. In holding that the provisions of section 112 (c) (2) of the Revenue Act of 1936 should be applied in determining your petitioner's taxable income from the reorganization of the Abercrombie & Fitch Company in 1937.

7. In failing to hold that your petitioner's taxable income from the reorganization of the Abercrombie & Fitch Company in 1937 should be determined in accordance with the provisions of sections 112 (c) (1) and 117 (a) of the Revenue Act of 1936.

74 8. In that its opinion and decision are not supported by the evidence and are contrary to law.

Wherefore, your petitioner prays that the decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected.

HOLT S. MCKINNEY,
Holt S. McKinney,
Attorney for the Petitioner,
122 East 42nd Street, New York, N. Y.

(Verified April 21, 1943.)

75 In the United States Circuit Court of Appeals

Notice of filing petition for review

TO:

COMMISSIONER OF INTERNAL REVENUE, *Respondent,*
Internal Revenue Building, Washington, D. C.
and
J. P. WENCHEL, *Chief Counsel, Bureau of Internal Revenue,*
Attorney for Respondent,
Internal Revenue Building, Washington, D. C.

You are hereby notified that the above-named petitioner, Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor, did, on the 26th day of April 1943 file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Tax Court heretofore

rendered in the above-entitled proceeding. Copy of the petition for review and the assignments of error, as filed, is hereto attached and served upon you.

Dated, New York, N. Y., April 22, 1943.

HOLT S. MCKINNEY,
Holt S. McKinney,
Attorney for the Petitioner,
122 East 42nd Street, New York, New York.

Service of the foregoing notice upon the respondent and
76 his attorney, together with a copy of the petition for review, and assignments of error described therein, is hereby admitted this 26th day of April, 1943.

(S) J. P. WENCHEL.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for the Respondent.

In The Tax Court of the United States

Praecipe for transcript of record

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to the petition for review heretofore filed in the above-entitled cause, a transcript of the record in said cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record duly certified copies of the following:

(1) Docket entries.
(2) Pleadings:
(a) Petition with annexed copy of deficiency letter.
(b) Answer.
(3) Motion of petitioner to amend the caption of the above proceeding.
(4) Order of the Board of Tax Appeals (now The Tax
77 Court of the United States) dated June 3, 1941, adopting the amended caption as prayed for in the above-mentioned motion of petitioner.
(5) Stipulation of Facts including Exhibits A, B, and C attached thereto.
(6) Opinion and Decision of The Tax Court.
(7) Petition for Review.

(8) Notice of filing Petition for Review, together with proof of service.

(9) This praecipe.

(10) Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in the record.)

HOLT S. MCKINNEY,
Holt S. McKinney,
Counsel for the Petitioner,
122 East 42nd Street, New York, New York.
J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for the Respondent.

78 [Clerk's certificate to foregoing transcript omitted in printing.]

79 In United States Circuit Court of Appeals for the Second Circuit

No. 93—October Term, 1943

(Argued January 6, 1944. Decided August 8, 1944.)

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Petition by Title Guarantee and Trust Company, Executor of the Will of Edward T. Bedford, deceased, to review an order of the Tax Court of the United States determining a deficiency of $13,887.24 on the part of the Estate of Edward T. Bedford in income taxes for the calendar year 1937. Reversed.

80 Holt S. McKinney, Attorney for Petitioner; Erwin R. Griswold and Holt S. McKinney, Counsel.

Samuel O. Clark, Jr., Assistant Attorney General, Sewall Key and Helen Goodner, Special Assistants to the Attorney General, for Respondent.

Opinion

AUGUSTUS N. HAND, Circuit Judge:

This appeal involves income taxes of the Estate of Edward T. Bedford, deceased, for 1937, in the amount of $13,887.24, and is taken from a decision of the United States Tax Court sustaining the assessment of the Commissioner of Internal Revenue. We think the decision of the Tax Court adjudging a deficiency of $13,887.24 should be reversed.

Edward T. Bedford died on May 21, 1931, and Title Guarantee and Trust Company is the executor of his estate and the taxpayer in this proceeding. Among his assets were 3,000 shares of 7% cumulative preferred stock of Abercrombie and Fitch Company (par value $100 per share) having a fair market value at the date of his death of $210,000. Because of business conditions prevailing in the years following Bedford's death Abercrombie and Fitch Company incurred losses, with the result that its surplus account showed a cumulative deficit of $399,771.87 on January 31, 1936. Included in charges against its surplus were amounts aggregating $844,100 which had been capitalized by three stock dividends issued in 1929, 1928, and 1930. Because of the deficit occasioned in the surplus account the Company had been unable for over five years to pay dividends on either its preferred or common stock. Accordingly a plan of recapitalization was 81 proposed and submitted to the stockholders for their consideration and approval and was adopted by them at a meeting held on December 8, 1936, and thereafter put into effect.

In accordance with this plan, the executor of Bedford received in January 1937, in exchange for its 3,000 shares of 7% cumulative preferred stock ($100 par value) the following:

	Fair market value
3,500 shares new Cumulative Preferred Stock of the Abercrombie and Fitch Company of a par value of $75 per share and an annual dividend of $6 per share	$288,750
1,500 shares of the Common Stock of the Abercrombie and Fitch Company of a par value of $1 per share	15,750
Cash of $15.08 per share	45,240
Total Fair Market Value	349,740

Abercrombie and Fitch Company had net earning after taxes during the taxable year ended January 31, 1937, of $309,073.70.

The stock received by the executor of Bedford in exchange for his former holdings was not subject to taxation because it was received through a reorganization and under the provisions of Section 112 (b) (3) of the Revenue Act:

"No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in

such corporation or in another corporation a party to the reorganization."

82 There concededly was a recognizable gain to the recipient to the extent of the cash distribution of $45,240 in so far as this cash and the securities received together exceeded the fair value of the shares the decedent held at the time of his death. This is so because of the provisions of Section 112 (c) (1) that in the case of money so distributed "gain * * * to the recipient shall be recognized but in an amount not in excess of the sum of such money and the fair market value of such other property."

It appears from the facts we have stated that the value of the stock Bedford held at the time of his death was $210,000 and the fair value of the securities and cash received through the reorganization was $349,740. Accordingly the gain amounted to $139,740 and the $45,240 of cash was taxable as a part of such gain if Section 112 (b) (3) should be applied. This, as we understand it, all parties concede. But the Commissioner held and successfully contended before the Tax Court that the cash distribution in pursuance of the plan of reorganization had "the effect of a distribution of a taxable dividend" and, therefore, subdivision 2 of Section 112 (c) (2), and not 112 (c) (1), applied. Section 112 (c) (2) provides that where such a distribution "has the effect of the distribution of a taxable dividend there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess on his ratable share of the undistributed earnings and profits of the corporation cumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property."

We held in Commissioner v. Quackenbos, 78 F. (2d) 156; Patty v. Helvering, 98 F. (2d) 717, and DeNobili Cigar Company v. Commissioner, decided June 20, 1944, that when earnings are once capitalized by the issue of stock dividends they are no longer

83 earnings but capital, except in cases where the purpose of the transaction is not an honest business purpose but one to avoid taxation. Under those decisions the distribution here was a liquidating dividend and not an ordinary dividend. The slight verbal changes in the provisions of Section 112 (c) (2) and Section 115 (g) seem to us the equivalent of provisions of prior Revenue Acts. We think our decisions are reasonable interpretations of the purpose of the statute and see no just ground for distinguishing between capital raised by the issue of stock dividends and that obtained through subscriptions pro tanto by the shareholders. Here the purpose of the issue of the stock dividends was to add to the capital and the object of the later reduction of the capital stock

through the reorganization was to enable the company to resume the payment of dividends when under the state law they could not be paid because the deficit had wiped out the surplus.

But even if the distributions here, according to the theory of the Commissioner and the Tax Court, might have been taken out of accumulated earnings, these distributions should have been charged to capital rather than surplus. In Foster v. United States, 303 U. S. 118, the Supreme Court held that where a corporation had made distributions in redemption of part of its stock they were to be considered distributions in partial liquidation chargeable to capital account and not distributions of surplus. See also Hellmich v. Hellman, 276 U. S. 233, 237.

The distribution here was a "partial liquidation" because all of the old stock of a par value of $300,000 was surrendered by the decedent for new stock having a par value of only $264,000. The transaction was evidently a distribution by Abercrombie and Fitch Company "in complete cancellation or redemption of a part of its stock." Such a distribution is a partial distribution as defined in Section 115 (i) of the Revenue Act. Hammans v. Commissioner, 121 F. (2d), 4, 7.

The order of the Tax Court is reversed.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of August, one thousand nine hundred and forty-four. Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges. Estate of Edward T. Bedford, Title Guarantee & Trust Company, Petitioner v. Commissioner of Internal Revenue, Respondent. Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

85 United States Circuit Court of Appeals, Second Circuit. Estate of Edward T. Bedford etc., v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 29, 1944. Alexander M. Bell, Clerk.

86 [Clerk's certificate to foregoing transcript omitted in printing.]

87 Supreme Court of the United States.

Order allowing certiorari.

Filed January 8, 1945.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. Counsel are requested to discuss in their briefs and on oral argument the question whether the application for certiorari was filed within the time provided by law.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter The Attorney General. File No. 49163. U. S. Circuit Court of Appeals, Second Circuit. Term No. 710. Commissioner of Internal Revenue, Petitioner, vs. Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executors. Petition for writ of certiorari and exhibit thereto. Filed November 29, 1944. Term No. 710 O. T. 1944.

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